In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 951

ALBERT P. MORETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted upon his plea of *nolo contendere* to one count of a two-count information charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by § 4412. He was sentenced to imprisonment for four months and probation for two years, and fined $3,000. The second count was dismissed on the government's motion.

Petitioner was one of approximately forty-five individuals arrested on October 8, 1964 in connection with a coordinated campaign against violators of the Wagering Tax Statute in the Bridgeport, Connecticut area. He challenges the constitutionality of the

207-705—66

statute when measured against the Fifth Amendment, advancing contentions which are the same as those raised in the petition filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.). Those contentions are answered by our combined brief in response to the cited petitions. See, also, *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

Additionally, he attacks the denial of his pretrial motion to suppress, contending that the affidavits in support of the search warrant were insufficient to establish probable cause and that the forcible entry into his apartment in execution of the warrant was not authorized by 18 U.S.C. 3109. His contentions in this respect, however, were mooted by his plea of *nolo contendere*. Had he gone to trial instead of so pleading, the trial court might have reversed its interlocutory pretrial determination and excluded the evidence (see *Cogen* v. *United States*, 278 U.S. 221, 224; *Gouled* v. *United States*, 255 U.S. 298, 312–313), the prosecution might have foregone its use, or, despite its admission, the jury might have acquitted.

In any event, the motion was properly denied. The affidavits in support of the application for the warrant, in addition to relating the statements of two reliable informants that petitioner was engaged in bookmaking activities (Pet. App. 38a) and stating the grounds for belief that he did not possess the necessary tax stamp (Pet. App. 42a–43a), showed that over a six month period he had received 542 long-distance toll calls from two known bookmakers

and that over a four-month period he had placed 64 long-distance toll calls to one of said bookmakers (Pet. App. 39a). The commissioner was thus supplied with sufficient information "to assess independently the probability that petitioner committed the crime charged." *Giordenello* v. *United States*, 357 U.S. 480, 487; see also *Jaben* v. *United States*, 381 U.S. 214, 224–225; *Jones* v. *United States*, 362 U.S. 257. Execution of the warrant was attempted at 1:15 p.m. (Pet. App. 46a), which is during the usual period of the day when wagers are placed and accepted by telephone. The agent thus had reasonable grounds to believe that petitioner was present in his apartment carrying on his bookmaking activities, and that the lack of response to the ring of the doorbell, knock on the door, and announcement of authority indicated refusal of admittance (as it in fact did) and not that the apartment was unoccupied. Compare *United States* v. *Viale*, 312 F. 2d 595, 602 n. 6 (C.A. 2), certiorari denied, 373 U.S. 903.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE 1966